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IN THE

SUPREME COURT OF NORTH CAROLINA

_____Term, 1976

No. 75-6981

****

JAMES A. BUSH,

Petitioner,

v.

STATE OF NORTH CAROLINA.

Respondent,

****

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

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STATE OF NORTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF NORTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme court of the State of North Carolina entered on January 29, 1976.

CITATION TO OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported at 289 N.C. 159.

JURISDICTION

The Judgement of the Supreme Court of North Carolina was entered and filed on January 29, 1976, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 NC § 1257 (3), Petitioner having asserted below, and is asserting here, deprivation of rights secured by the Constitution of the United States.

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QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the laws of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

N.C. Sess. Laws 1973 (2nd Sess., 1974), c. 1201, §1, amending N.C. Gen. Stat. § 14-17 (1974 cum. supp.):

> "Murder in the first and second degree defined; punishment.-- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the prepetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

§14-87 (repl. vol. 1969):

> "Robbery with firearms or other dangerous weapons.-- Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence, or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

§15-176.3 (repl. vol. 1975):

> "Informing and questioning potential jurors on consequences of guilty verdict.--When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed

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upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

§ 15-176.4 (repl. vol. 1975):

"Instruction to jury on consequences of guilty verdict.--When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

§15-176.5 (repl. vol. 1975):

"Argument to jury on consequences of guilty verdict.-- When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

§15-187 (repl. vol. 1975):

"Death by administration of lethal gas.-- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor."

§15-188 (repl. vol. 1975):

"Manner and place of execution.-- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina pentitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

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STATEMENT OF THE CASE

On November 18, 1974, Eva Ann Marshburn and her husband, Kirby Marshburn, lived about eleven miles from Jacksonville, North Carolina on Highway 258 and Mrs. Marshburn was working at Belk's Department Store in Jacksonville and Kirby Marshburn was working at Simpson Brothers Store on Highway 258. On November 18, Mr. Marshburn left home about 6:00 a.m. to go to work and Mrs. Marshburn left at about 1:00 p.m. to go to work. When Mrs. Marshburn returned at about 7:40 p.m. she was driving a 1970 Ford. Her husband's truck was parked in front of the mobile home. Upon entering the mobile home Mrs. Marshburn noticed the bedrooms were disarrayed and in the living - dining area she saw her husband lying on the floor in some blood. There was a steak knife and a billfold lying near the body of her husband andupon getting up the defendant was standing behind her. A conversation took place between the defendant and Mrs. Marshburn and Mrs. Marshburn asked that the defendant not kill her and the defendant stated that he would not. The defendant tied Mrs. Marshburn in a chair in the dining area after he took about $3 and some change from her. The defendant cut the telephone wires and got Mrs. Marshburn's car keys and left. The defendant came back in a few minutes later and asked how to turn on the lights in the car. He also asked if there was a gun in the house and Mrs. Marshburn told him where a rifle was and he got it and there were no shells. The defendant left and some time later Mrs. Marshburn got free of the chair and went for help.

Mrs. Marshburn did not know if her husband was carrying a wallet on that occasion or if he had any money in his pocket but it was his normal custom to carry a wallet and he "usually" had some money in his pocket. The defendant did not physically harm Mrs. Marshburn (Rpn.10-17).

Members of the Onslow County Sheriff's Department arrived at about 10:18 p.m. and the Medical Examiner arrived shortly thereafter. Mr. Marshburn had been cut on the neck and there were several stab wounds in the front of his body. (R.p. 17).

Sometime after 9:00 p.m. on November 18, 1974, Michael James Papenfuse left a club on Highway 258 between the Marshburn home and Jacksonville and outside the club he saw a man that he knows to be the defendant. The two men chatted; the defendant went inside for a short time and then left. A Deputy Sheriff found the Marshburn automobile at

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about 11:30 p.m. on November 10, 1974, near the main entrance gate to Camp Lejeune Marine Corps Base near Jacksonville. (R.pp. 19-20).

Earlier on the night of November 10, 1974, the defendant had been at an enlisted men's club at Camp Lejeune Marine Corps Base. He had arrived at about 4:30 p.m. and had stayed until about 6:00 p.m. and had been drinking beer. On one or two occasions he had been asked to get from behind the bar by the manager. On one occasion he had been behind the bar playing with children of the barmaid that were behind the bar with her. The keys to the barmaid's car (1974 Pontiac) disappeared and the defendant left the premises at about 6:00 p.m. The 1974 Pontiac was later found in a ditch about one mile from the Marshburn home town is Richlands. (R.pp. 19-20).

The County Medical Examiner examined the Marshburn body at about 11:00 p.m. in the Marshburn home and performed an autopsy at :15 a.m. the next day. There were six stab wounds in the front of the body and several lacerations on the face and a cut on the neck. In the opinion of the Medical Examiner death was caused by a stab wound through the sternum into the heart. The only wound that would have caused death was the wound in the heart. The sternum is a moderately hard and thin bone in the middle of the chest and it could be pierced by a pencil or any other sharp object. (R.pp. 21-22).

On the night of November 10, 1974, prior to :15 p.m. two persons stopped at a black 1974 Pontiac that was in a ditch about one mile from the Marshburn home and the defendant was with the car. Each person offered assistance but the defendant stated that he would try to get a ride back to the Marine Corps Base because he was wearing a utility uniform and this was not proper dress in off-base areas. There was no difficulty between the defendant and either person who stopped. If one were to leave the place where the Pontiac was in the ditch and go toward Jacksonville, the Kirby Marshburn mobile home would be the first residence on the way. There was a house right across the road from the car and it did not appear that anyone was home by looking at the home although someone was actually in the house. The 1974 Pontiac was the car that was owned by the husband of the barmaid at the club where James Bush had been earlier that evening. The Ford automobile that was found near the main entrance gate to Camp Lejeune was the car that was owned by Mrs. Marshburn. (R.pp. 23-25).

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A Detective with the Onslow County Sheriff's Department testified that he interviewed the defendant on November 1[illegible], 1974, and after advising the defendant of his constitutional rights the defendant told him that he had taken the Pontiac from the club, had been drunk and had run the car into a ditch and had walked up the road to the first home and knocked on the door and asked to use the phone. He further stated that he was allowed into the home by a man that he now knows to have been Mr. Marshburn, that he tried to use the phone but could not reach his party and that he then asked Mr. Marshburn for a drink of water which he was given. He stated that the man got belligerent with him and told him to get out of the house and pushed him into the sink and that he (the defendant) grabbed a knife out of the sink and stabbed the man two or three times. That he (the defendant) was in the truck outside the home when Mrs. Marshburn came home and that he went inside after her and took $3 from her and tied her up. He stated that he told the woman that he was not going to kill her and he did not mean to kill her husband. He stated that he could not find the light switch on the woman's car and went inside and asked her about a gun and she gave him a rifle. The defendant stated that he went to the base, left the car at the gate and walked onto base and took a taxi to his barracks where he went to bed but could not go to sleep because he was thinking about what had happened. At his barracks the defendant showed the officers where he had put the car keys, the clothes that he had worn and let the officer get into his locker without a search warrant. The defendant told the officer about meeting Mr. Papenfuse. (R.po. 25-29).

Detective Bill Woodward talked to the defendant and the defendant showed him his clothing and recited to him what he stated happened in the mobile home. The defendant showed Mr. Woodward where he had placed the keys to the Pontiac automobile and showed him the wooded area where he had thrown the keys to the Ford. The defendant told Officer Woodward all of this after he had been advised of his rights to remain silent and to have an attorney present. On the night in question Mr. Woodward stated that the area around the Marshburn residence was wet and the weather was cool. (R.pp. 29-31).

The clothing that the defendant had worn that night was taken by Deputy Arthur A. Marshburn and turned over to SBI Agent Phillips who in

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turn turned it over to an SBI laboratory chemist. The chemist found traces of human blood on some of the clothes but not on other pieces of clothing. On the defendant's trousers he found two spots of blood on the left trouser leg in the area near the inseam. On the right leg he also found blood on the inside of the leg. He found a substance on the kitchen knife that proved to be human blood and also found human blood on the defendant's boots. On the defendant's gloves there was a substance that appeared to be grease and dirt. All the blood that was human blood was of Group A, the same group of the deceased's blood. (R.pp. 31-35).

The defendant testified and stated that he was twenty years of age and was from Albany, New York and that he was a military truck driver at Camp Lejeune. That on November 18, 1974, he worked until 4:30 and went to the service club to drink beer and play pool. He was wearing the gloves that he word ar work and they had dirt and grease on them. That he stayed at the club until 7:15 p.m., that he did not go behind the counter and was not asked to leave. That he took the Pontiac automobile without permission and was drunk and drove the car in a ditch. That one or more young men stopped to help him and he later left walking towards Jacksonville and came to a mobile home with a truck out front and knocked on the door and was allowed into the mobile home to use the phone. That he tried to make a phone call but could not reach the party he was seeking and asked for a drink of water and this was given to him by the man. That up until that time the relationship had been good. That as he was drinking the water he stood by the sink and the man started talking about a "colored boy" down the road who owned a wrecker. As a result of this, ill words followed and the man pushed the defendant against the sink and told him to get out of the mobile home and the defendant grabbed a knife out of the sink and stabbed the man several times in the chest and the man fell. That at this time the defendant had had no evil purpose in mind and did not go to the mobile home to rob anybody. That after stabbing the man he looked for the car keys and that is the way the bedrooms became disarrayed. That he went through the man's pockets and found car keys and looked in the man's wallet and threw the wallet on the floor. That prior to stabbing the man he had no idea or intention of going through the house or looking at the man's wallet. That while he was outside a lady drove up and went

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into the house and he followed he / That inside he had a confrontation with the lady and told her he did not want to kill her and he said nothing to her as to why he stabbed the man. He only told her he did not want to kill her and he had not meant to kill her husband. That he tied the lady up with drapery cords in a chair, took $3 from her and left but came back because he couldn't find the lights on the car. He got a rifle and it was not loaded and he never pointed it at the lady. That he left the house and drove off in the Ford automobile. That he stopped at a club between the Marshburn house and Jacksonville to get some cigarettes and saw a man named Papenfuse. That he did not leave the house in the truck when the lady came up because he did not want to be followed. That he cut the telephone cord to make sure the lady did not call the police and that he did not tie the lady tight because he did not want to hurt her. That when he made his statement to the officers he realized he did not have to make the statement and when he gave him permission to search his locker he realized that he did not have to. He stabbed the man to get him away from him although he now realizes he probably used more force than was necessary. That in New York he had been convicted of assault, car theft and possession of Marijuana in North Carolina. That he joined the Marine Corps because of the car theft charges. That the people that had offered him assistence were refused by him because he had to get all the way back to base because of his dress. That he did not know the man that he stabbed; that he did not know if anyone else was in the house although he had not seen anybody else and that he only stabbed the man after he had been pushed back against the sink. That the man was much older than him although he did not know that the man was sixty-five years old. That he agreed that it was strange that the man would tell him to get out and then push him away from the direction of the door. That while walking from the Pontiac to the Marshburn home he did pass a store with a telephone booth out front and he did have some change in his pocket. That he was afraid of using the phone because the store was closed and he did not want anybody to think he was trying to rob the store. That he also wanted to get as far away from the car as he could since he had stolen it. That the thought of robbery never entered his mind when he went into the Marshburn house. At the time he grabbed the knife and stabbed the man he feared for his safety although the man had no weapon and had not threatened him with a weapon. There

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was nothing behind the man but there was a sink behind him (the defendant). That he did not stomp the man when he was on the floor and he did not get on the floor to stab the man. That all the stabbing took place with both people standing up. That he did not get the wallet out of the man's pocket until he had fallen on the floor and after he (the defendant) had been looking for car keys. That he did not go to the house for the purpose of robbing the man that night. That he had not planned on killing Mrs. Marshburn even before she asked him not to and that the reason he stabbed Mr. Marshburn was not because Mr. Marshburn would not give him the money. That he believes his gloves got bloody from stabbing Mr. Marshburn. (R.pp. 35-47).

Father Michael Joseph Hogan, a Catholic priest from Albany, New York, testified that he was the Executive Directors of a group of rehabilitation homes in Albany and that he had known James Bush for several years when he was living in Albany. That James lived in one of the residential facilities that he supervised. That he had had occasion to counsel James Bush and had lived in the home with James Bush for several months on a daily basis. That he had an opinion as to the general character and reputation of James Bush and that it was good. That James Bush was never known as a person who was, by nature, violent. That he had not seen James Bush in one or one and a half years since he entered the Marine Corps. (R.pp. 47-48).

The trial court instructed the jury that it could find the Petitioner guilty of murder in the first degree under the theory of premeditation and deliberation, guilty of murder in the first degree on the theory of felony-murder, guilty of murder in the second degree or guilty of manslaughter or not guilty.

The jury found the defendant guilty of murder in the first degree and the defendant was sentenced to death. On January 29, 1976, the Supreme Court of North Carolina affirmed the Petitioner's conviction and sentence. 1/

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1/ On February 12, 1976, Chief Justice Suzie Sharp stayed execution of Petitioner's death sentence in order to allow a Petition for Certiorari to be filed in this Court.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Petitioner raised before the North Carolina Supreme Court the question of whether or not the death penalty as applied in this case was Constitutional[2/] and the North Carolina Supreme Court rejected the claim.

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2/ Assignment of Error No. 1 (R. 73).

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REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There are now pending before the United States Supreme Court cases challenging the constitutionality of the death sentence imposed under the capital procedure mandated by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). 3/ There is also at least one case 4/ before the United States Supreme Court by Petition for Certiorari which arises under the post-Waddell North Carolina death penalty statute which was enacted April 8, 1974, effective immediately. 5/ Because this statute does not in any way alter North Carolina's capital procedure so as to limit or control the arbitrary and capricious infliction of the State's nominally mandatory death penalty, petitioner incorporates here by reference the arguments and authorities contained at pp. 26-140, Brief for Petitioner, Fowler v. North Carolina, No. 73-7031 (attached as Appendix B, infra) concerning (1) the arbitrary infliction of the death penalty due to prosecutorial charging discretion, plea bargaining, jury discretion and executive clemency, and (2) the excessive cruelty of the death penalty.

This case shows once again that if a defendant does not have the opportunity afforded him or her to plea to a lesser degree of homicide than that defendant is prosecuted under the "mandatory" provision of the statute and that the death penalty is only "mandatory" for those who do not arouse the passion or sympathy of someone during the process which leads to trial.

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3/ Henderson v. North Carolina, No. 73-6853 (filed June 8, 1974); Fowler v. North Carolina, No. 73-7031 (Certiorari granted October 21, 1974; citations of other cases omitted.

4/ Woodson and Waxton v. North Carolina, No. 75-_____ (filed _____), Reported in 287 N.C. 578, 215 S.E. 2d 607 (1975).

5/ N.C. Sess. Laws 1973 (2nd Sess., 1974) c. 1201, §1, amending N.C. Gen. Stat. §14-17 (1974 Cum. Supp.).

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CONCLUSION

The petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted, this 23 day of June, 1976.

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